United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

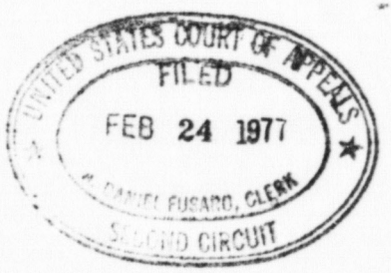
76-7580

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL CONTROLS CORP.,	:	DOCKET NO. 76-7580
Plaintiff-Appellee,	:	
vs.	:	Civil Action
ROBERT L. VESCO, et al.,	:	On Appeal from the United States District Court for
Defendants,	:	the Southern District of New York
and	:	
VESCO & CO., INC.,	:	Sat Below: Honorable Charles E. Stewart, Jr. U.S.D.J.
Defendant-Appellant.	:	

BP/s

REPLY BRIEF FOR DEFENDANT-APPELLANT, VESCO & CO., INC.



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PRELIMINARY STATEMENT

This brief is submitted in reply to the brief submitted by plaintiff-appellee, International Controls Corp. (hereinafter "ICC"). The sole issue addressed herein is whether issues of voidness of the May 27, 1976 District Court judgment, raised below by motion of Vesco & Co., Inc. (hereinafter "the Company"), are properly before this Court on appeal.

STATEMENT OF FACTS AND THE CASE

A detailed exposition of the procedural history of these proceedings and the relevant facts on this appeal are presented in the Company's prior brief. Rather than fully reproducing that statement, the Company respectfully refers this Court thereto and incorporates that portion of its prior brief by reference.

ARGUMENT

ISSUES OF VOIDNESS OF THE MAY 27, 1976 DISTRICT COURT JUDGMENT, NECESSARILY RAISED BELOW BY MOTION UNDER RULE 60b, ARE PROPERLY BEFORE THIS COURT ON APPEAL.

In support of its application for relief pursuant to Federal Rule of Civil Procedure 60b, the Company argued below that the District Court's May 27, 1976 judgment was facially void in three important respects, such defects apparently resulting from the inadvertence or mistake of the court. The Company's positions were summarized in the opinion below, as follows:

> "Defendant's main argument here rests on its contention that the May 27, 1976 judgment is void because it refers only to the original complaint, and not to the amended complaint which had been filed before the default against Robert L. Vesco ("Vesco") was entered."
>
> *****
>
> "Defendant's second ground for seeking to open the judgment is that the May 27, 1976 judgment 'on its face, does not make sense' (Besser letter of September 15, 1976), if its references to the various counts of the complaint are read as relating to the original complaint.
>
> *****
>
> "Finally, defendant seeks to vacate the

May 27 judgment on the ground that the reference to a judgment having been entered on July 12, instead of July 16, 1974, was incorrect." International Controls Corp. v. Vesco, 73 Civ. 2518 at 5,9,10 (S.D. N.Y. Nov. 1, 1976). (Emphases supplied).

Relief from the judgment was requested on the authority of Fed.R.Civ.P. 60(b)(1) and (4), which provide:

"RULE 60. RELIEF FROM JUDGMENT OR ORDER

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD; ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

*****

(1) mistake, inadvertence, surprise, or excusable neglect;

*****

(4) the judgment is void."

In the instant appeal from denial of such relief, the Company again urges the precise positions argued below concerning the facial voidness of the judgment.* Additionally, the Company contends that the District Court abused its discretion by failing to grant relief from the May 27 judgment

* Brief for Appellant, Vesco & Co., Inc., Points I,II,III.

solely on the equitable grounds provided in Fed.R.Civ.P. 60(b)(6).* That subsection authorizes granting relief from judgments for:

> "(6) any other reason justifying relief from the operation of the judgment."

In its reply brief, while conceding that the abuse of discretion issue is properly before this Court, ICC erroneously asserts that only that issue is appealable. This contention is apparently based upon the entirely inaccurate assumption that the Company's motion was "for an order, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, vacating and rentering the judgment of May 27, 1976..." (ICC's brief at iii). Quite to the contrary, as noted by the court below, the threefold grounds adduced in support of the Company's motion related solely to defects on the face of the judgment, as specifically provided for in subsection 60(b)(4) of the Rule. Moreover, pursuant to 60(b)(1), such facial deficiencies apparently resulted from the trial court's inadvertence and/or mistake in basing judgment upon an original complaint rendered defunct by the filing of an amended complaint, failing to clarify which claims are covered by the judgment, and improperly

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* Brief for Appellant, Point IV.

entering the judgment nunc pro tunc as of July 12, 1974, a date without relevance in these proceedings.

Indeed, the relevant authorities hold that where, as in the instant case, the Rule 60b motion is based upon the unique grounds enumerated therein, the only remedy is a motion under the Rule, rather than direct appeal from the defective judgment.

In Rohauer v. Friedman, 306 F.2d 933 (9th Cir. 1962), the defendant appealed from an adverse judgment in a copyright infringement case, claiming that fraud was perpetrated upon the parties and the court in the alteration of documentary evidence. The court held that an appeal based upon such an allegation was an improper substitute for a motion brought under Fed.R.Civ.P. 60(b)(3), which specifically provides for relief from judgments where fraud is committed against the trial court. Accordingly, the appeal was dismissed. Accord, Connoly v. Papachristo, 504 F.2d 917 (5th Cir. 1974), where an appeal was dismissed where based upon new evidence and, therefore, should have been brought by motion under 60(b)(2); Southern Farm Builder Casualty Insurance Co. v. Morgan, 339 F.2d 755 (5th Cir. 1964), where the court held that inadvertent error by the trial court in stating the amount of damages should have been remedied by motion under Rule 60(b)(1)

and not by appeal.

As observed below, the kinds of error asserted by the Company go to questions of facial voidness of the May 27 judgment, as provided for in 60(b)(4), and the trial court's inadvertence and/or mistake, the ground for relief stated in 60(b)(1). Hence, it is clear that the Company is not seeking, as ICC contends, "to appeal from the amended judgment of May 27, 1976 by indirection after the time for appeal has expired" (ICC's brief, at 14). To the contrary, since the grounds asserted for reversal are those specifically enumerated in the Rule, the issues posed are uniquely appropriate for resolution under 60b as opposed to appeal.

It matters not that the grounds for reversal raised herein are analagous to those raised by the Company in its untimely appeal from the May 27 judgment. Where, as here, the 60b motion is based upon the grounds enumerated in the Rule, expiration of the time for appeal is irrelevant, so long as the motion is made within a reasonable time of the judgment and within one year where subsections (1), (2) or (3) are invoked. Mas v. Fowler, 337 F.2d 414 (4th Cir. 1964); Carraway v. Sain, 23 F.R.D. 657 (N.D.Fla. 1959). It is indisputable that these time requirements have been fully

satisfied by the Company. As a result, prior filing and dismissal of the Company's appeal from the May 27 judgment has no bearing on resolution of the 60b application.

In the instant appeal, therefore, no legal or equitable bar exists to preclude consideration by this Court of all issues considered and decided by the District Court. Hence, all grounds for reversal urged herein by the Company are properly before this Court.

CONCLUSION

For the reasons expressed herein, it is respectfully submitted that this Court should reverse the decision below denying relief from the May 27, 1976 judgment of the District Court, and that the May 27 judgment be vacated.

Respectfully submitted
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DATED: February 24, 1977

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ACKNOWLEDGMENT OF SERVICE

Service of two (2) copies of Reply Brief for Defendant-Appellant, Vesco & Co., Inc., is hereby acknowledged this 24th day of February, 1977.

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ACKNOWLEDGMENT OF SERVICE

Service of two (2) copies of Reply Brief for Defendant-Appellant, Vesco & Co., Inc., is hereby acknowledged this 24th day of February, 1977.

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